91-1046

No. _____

IN THE SUPREME COURT OF THE UNITED STATES

November Term, 1991

UNITED STATES OF AMERICA,

RESPONDENT,

versus

BYRON LESTER THOMPSON,

PETITIONER.

On Petition for a Writ of Certiorari
To the United States Court
Of Appeals For the Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

COUNSEL OF RECORD:

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QUESTIONS PRESENTED

Should improperly obtained pen register evidence be subject to the exclusionary rule where it is used to establish probable cause for the issuance of the Title III wiretap order?

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IN THE SUPREME COURT OF THE UNITED STATES
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Of Appeals For the Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

The Petitioner, Byron L. Thompson, prays that a Writ of Certiorari be issued to review the judgment of the United States Court of Appeals for the Eleventh Circuit in this case.

CITATIONS TO OPINION BELOW

The opinions relevant to this case are reported in United States v.

Thompson, No. CR489-59 (S.D. Ga. 1989), aff'd. United States v. Thompson, 936 F.2d 1249 (11th Cir. 1991). (See Appendix A., pp. 1-3).

JURISDICTION

The United States Court of Appeals for the Eleventh Circuit entered its judgment on September 3, 1991. The Petitioner did not seek a rehearing in that Court. He invokes this Court's jurisdiction, pursuant to 28 U.S.C. §§41, 1291, and 1294(1) and Rule 4 of the Federal Rules of Criminal Procedure.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The pertinent provisions and statutes are Chapter 119 of Title 18 U.S. Code (Title III), §§2510-2520 (wiretap statute) and §§3121-3127 (pen register statute).

STATEMENT OF THE CASE

The Petitioner, Byron L. Thompson, (hereinafter Thompson), was indicted by the Federal Grand Jury of the Southern District of Georgia and charged, along with twenty-nine others, with operating a drug conspiracy out of Savannah, Georgia. In pre-trial motion hearings, Thompson challenged the validity of a Title III wiretap issued by the District Court on August 1, 1989. The magistrate issued a pen register order on June 28, 1989, and a wiretap order was issued by the District Court in August of 1989. Although the applicant for the pen register was set forth as Joseph D. Newman, Assistant United States Attorney (AUSA), the application was signed by AUSA Kathy M. Aldridge "for Joseph D. Newman."

Thompson challenged this procedure as violative of 18 U.S.C. §3122 (1988) and asked the Court to suppress the wire tap issued as a result of evidence obtained from the pen register.

The District Court rejected Thompson's arguments as to the invalidity of the issuance of the pen register and subsequent wire tap. The Court found Ms. Aldridge was an "applicant" within the meaning of 18 U.S.C. §3122 (1988) "despite the manner in which [she] signed the application." (Appendix C., p. (16) - Magistrate's Report and Recommendation, No. CR 489-59 (S.D. Ga. 1989)). Additionally, the District Court found that even if Ms. Aldridge were not a proper applicant for the order, the "exclusionary rule in this case would be inappropriate since no constitutional

violation occurred." (Appendix C. at p. (18)) The District Court held that, absent the constitutional exclusionary rule under the Fourth Amendment, there was no statutorily-created exclusionary rule regarding pen registers.

Following the denial of Thompson's motion on wiretap evidence, he entered into a plea agreement with the United States government and pleaded guilty to counts two and three of the indictment. As part of the plea agreement, Thompson reserved his right to appeal the District Court's determination of the propriety of the pen register and wire tap orders and to withdraw his guilty plea if the District Court was reversed. Subsequent to his guilty plea and pre-sentence report, Thompson was sentenced by the District Court to 293 months

incarceration. Thompson is presently in the custody of the United States Bureau of Prisons.

The Court of Appeals for the Eleventh Circuit assumed that the procedure used by the District Court constituted "a technical violation of the [Pen Register] Act." U. S. v. Thompson, 936 F.2d 1249, 1250 (11th Cir. 1991). The Court of Appeals reasoned that where the magistrate could not remember the specific circumstances of the application, where it was uncertain that the substitute attorney had knowledge of the case, and where the application did not meet the statutory requirements, the Act had been violated. "In the absence of explicit recollection by the magistrate judge or testimony from the signing attorney about any assurances she made to the court, we have serious

reservations about the accuracy of the holding." Thompson, 936 F.2d at 1250.

The Court of Appeals held that even if the pen register order was improperly issued under the statute, Thompson would still not be entitled to suppress the information obtained by the government through the pen register. The Court of Appeals refused to exclude the evidence for two reasons. First, since there was no constitutional requirement for a warrant prior to obtaining a pen register, non-compliance with 18 U.S.C. §3122 would not be under a judicially-created exclusionary rule. Second, because Congress did not specifically include an exclusionary rule under the pen register statute, as it did in the wire tap legislation at 18 U.S.C. §§2515 and 2518(10)(a) (1988), Congress did not

intend for that statutory exclusion to apply to pen registers. The Court of Appeals noted that violators of the provisions of the statute regarding pen registers incur fines and possible imprisonment. The Court reasoned that if Congress intended an additional exclusionary penalty to apply, it would have placed it within this section. Thompson, 936 F.2d 1252.

The Court entered its judgment September 3, 1991. The basis for federal jurisdiction is 28 U.S.C. §1254.

REASONS FOR GRANTING THE WRIT

This case involves a novel issue of law which has not previously been decided by this Court, but which should be resolved. Whether evidence obtained from an improperly issued pen register and subsequent wire tap should be subject to

the exclusionary rule is a crucial issue in light of the controls imposed by Congress in the area of electronic surveillance.

The Court of Appeals for the Eleventh Circuit assumed that the procedure followed in the application and issuance of the pen register was a violation of the pen register statute. At the same time the Court denied Thompson a remedy. The Court reasoned that even if the substitute attorney were not a proper applicant, the exclusionary rule would be inapplicable to the statutory violation as the use of the pen register is not a search under the Fourth Amendment. This rule was based upon this Court's decision in Smith v. Maryland, 442 U.S. 735 (1979).

An order for a pen register may issue upon application of an attorney for

the government "in writing under oath or equivalent affirmation." 18 U.S.C. §3122 (1988). The attorney for the government certifies that the information likely to be obtained by the installation of a pen register is relevant to an ongoing criminal investigation. 18 U.S.C. §3123.

The requirements that the applicant for a pen register: 1) apply in writing "under oath or equivalent affirmation," and 2) certify that the information likely to be obtained by the installation of a pen register is relevant to an ongoing criminal investigation, express the clear intent of Congress to impose controls on the issuance of orders for pen registers and to place the issuance of pen register orders under the authority of the Court. 18 U.S.C. §§3122 (a)(1), 3122(b)(2) (1988). Here, the

information obtained from the improperly issued pen register was used to establish probable cause to secure a Title III wiretap. Title III (18 U.S.C. §§2515 and 2518(10)(a)) excludes evidence from wiretaps obtained in violation of the statute. The chain of actions leads to the conclusion that if the pen register was based on an improper application, then the order for the wiretap must necessarily also be improper. The next logical link in the chain is to exclude the evidence improperly received to remedy violations of the congressional mandate. To deny a remedy for the improper issuance of a pen register is to render the safeguards incorporated by Congress into the 1986 Pen Register Act meaningless.

Although the statute imposes fines and imprisonment for knowing

violations of the Act, these remedies are not applicable to cases, as here, in which an order is obtained for the pen register. 18 U.S.C. §§3124(e) and 3121(a) (1988). The fundamental unfairness of this situation does not square with the intent of Congress, manifest in the provisions of the 1986 Pen Register Act, to safeguard citizens from the improper issuance of pen register orders. Congress intended that the Government strictly comply with federal laws relating to electronic surveillance. The ruling below makes it clear that this congressional mandate is hollow. A necessary remedy to assure compliance with the law is to disallow evidence obtained as a result of the improper pen register order to be used as the basis for a Title III wiretap order. Without such remedy, the safeguards

incorporated by Congress into the 1986 Pen Register Act are meaningless.

CONCLUSION

The judgment below fails to provide a remedy for an improperly issued pen register and allows the illegal order to be used for issuance of a Title III wiretap order. The case involves substantial and important issues not previously addressed by this Court but which should be settled. The Petition for Writ of Certiorari should, therefore, be granted.

RESPECTFULLY SUBMITTED, this the 27th day of November, 1991.

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Attorney for the Petitioner.

APPENDIX

APPENDIX A.

IN THE UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF GEORGIA

SAVANNAH DIVISION

UNITED STATES OF AMERICA	)	
	)	
vs	)	CR489-59
	)	
BYRON LESTER THOMPSON	)	

The judgment of this court in the above entitled action having been AFFIRMED;

IT IS HEREBY ORDERED that the judgment of the Eleventh Circuit, U. S. Court of Appeals, is made the judgment of this Court.

This 3rd day of September, 1991.

B. AVANT EDENFIELD
CHIEF JUDGE, U. S. DISTRICT COURT
SOUTHERN DISTRICT OF GEORGIA

UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

NO. 90-8343

D. C. DOCKET NO. CR489-59-1

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

BYRON LESTER THOMPSON,

Defendant-Appellant.

Appeal from the United States District Court for the Southern District of Georgia

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Before KRAVITCH and COX, Circuit Judges, and RONEY, Senior Circuit Judge.

JUDGMENT

This cause came to be heard on the transcript of the record from the United States District Court for the Southern District of Georgia, and was argued by counsel;

ON CONSIDERATION WHEREOF, it is

now hereby ordered and adjudged by this Court that the judgment of convictions of the said District Court in this cause be and the same is hereby AFFIRMED.

Entered: July 30, 1991

For the Court: Miguel J. Cortez, Clerk

By: Karleen McNoble, Deputy Clerk

ISSUED AS MANDATE: AUGUST 22, 1991

APPENDIX B.

IN THE UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF GEORGIA

SAVANNAH DIVISION

UNITED STATES OF AMERICA	) NO.: CR489-59
	)
v.	)
	)
BYRON LESTER THOMPSON, et al.,	)
	)
DEFENDANT.	)
	)

THIS MATTER comes before the Court pursuant to the Order, dated and entered on March 11, 1990, (a copy of which is attached hereto and made a part hereof), regarding allowance of Defendant Thompson's Objections to the Magistrate's Report, filed on November 29, 1989.

WHEREFORE, after careful review of the file, the Court concurs with the Magistrate's Report and Recommendation, to which objections have been filed by Defendant. Accordingly, the Report and

Recommendation of the Magistrate is adopted as the opinion of the Court and the Defendant's Motion to Suppress is hereby DENIED.

AND IT IS SO ORDERED, this the 28th day of June, 1990, in Savannah, Georgia.

B. AVANT EDENFIELD, JUDGE
UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF GEORGIA

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF GEORGIA
SAVANNAH DIVISION

UNITED STATES OF AMERICA, Plaintiff,	)	
v.	)	Case No. CR489-59
BYRON LESTER THOMPSON, et al., Defendants.	)	

REPORT AND RECOMMENDATION

Defendant Byron Thompson has moved the Court to suppress certain evidence obtained by the government by electronic surveillance of defendant's cellular phone, (404) 626-2032. In his motion to suppress the wiretap evidence, defendant contends that probable cause for the issuance of the wiretap order was based upon unlawful evidence, that the wiretap was issued without probable cause to believe that the defendant in fact used the cellular phone, and that federal

agents failed to minimize the interception of nonrelevant conversations. After carefully considering the evidence, the statutory provisions, and the case law, I find that the defendant's motion is without merit and should be denied.

BACKGROUND

On August 1, 1989, Assistant United States Attorney Joseph D. Newman, after obtaining the necessary authorization from the Assistant Attorney General in charge of the Criminal Division, applied for an order from this Court authorizing the interception of wire communications associated with cellular telephone number (404) 626-2032. In the application and accompanying affidavit by DEA Special Agent Darrell R. Snider, the government set forth its probable cause basis for believing that the subject

telephone was being used in connection with an on-going conspiracy to possess and distribute cocaine and crack cocaine in the Savannah, Georgia area. The agent's affidavit set forth in elaborate detail the government's factual basis for believing that Yves "Lucky" Pierre, Byron Lester Thompson, Anthony Jackson, Julie Kennedy, Byron Sanders, Mark Williams, Lawson Huff, Reginald Wall, Eugene Moore, and other unidentified individuals were members of a large cocaine distribution organization headed by Pierre in Miami and by Thompson in Savannah. The affidavit reflected that the probable cause showing was based upon information furnished by confidential informants, intelligence information from various law enforcement agencies, telephone billing and toll records, information obtained through pen

registers authorized by this Court, and information obtained pursuant to a judicially authorized wiretap of cellular telephone number (912) 658-2724.[1]

After considering the government's application and the affidavit of the DEA case agent, on August 1, 1989, Chief Judge Anthony A. Alaimo of this Court entered an Order authorizing the interception of wire communications over cellular telephone number (404) 626-2032, subscribed to by Leroy Stanley. During the 22-day period of the wire tap, the government intercepted a total of 584

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[1] The initial wiretap in this case was conducted pursuant to an order entered by Judge Edenfield of this Court on July 5, 1989. The wiretap order authorized the interception of communications over a cellular telephone subscribed to by Alissa Hamilton and frequently used by Anthony Jackson in connection with the criminal conspiracy. The wiretap was terminated on July 28, 1989.

calls, 51 of which were minimized. The wiretap was terminated on August 21, 1989, whereupon the original tapes and logs were delivered to the Court and placed under seal.

DISCUSSION

I. Was The Wiretap Based Upon Evidence Obtained From An Unlawful Pen Register?

The defendant first contends that the government's showing of probable cause for an order authorizing the wiretap of cellular telephone (404) 626-2032 was based upon evidence obtained pursuant to the unlawful use of a pen register device on the subject phone. The defendant concedes that on June 28, 1989, the undersigned judicial officer entered an ex parte Order authorizing the installation and use of the pen register device. The defendant points out, however, that the

pen register order was issued pursuant to an application which listed Assistant United States Attorney (AUSA) Joseph D. Newman as the applicant but which was in fact signed by AUSA Kathy M. Aldridge "for Joseph D. Newman." The defendant argues that since no provision of the pen register statute authorizes one government attorney to sign for another, the pen register Order should not have issued and the evidence obtained pursuant to that pen register should not have been used to establish probable cause for the issuance of the second Title III wiretap.

In 1979 the Supreme Court held that the government's installation and use of a pen register device to record numbers dialed from a suspect's telephone is not a "search within the meaning of the Fourth Amendment." Smith v. Maryland, 442 U.S.

735 (1979). Hence, the Court concluded that there is no constitutional requirement that the government obtain a warrant before utilizing a pen register device. In 1986, however, Congress enacted the Electronic Communications Privacy Act, 18 U.S.C. §3121 et seq., which imposes a general prohibition on the use of pen registers or trap and trace devices without a court order. 18 U.S.C. §3121(a). Under §3122(a) of Title 18, "[a]n attorney for the Government may make application" for a court order authorizing the use of a pen register. The application shall be "in writing under oath or equivalent affirmation...." Id. The application shall contain, inter alia, "a certification by the applicant that the information likely to be obtained [through the pen register] is relevant to an

ongoing criminal investigation" being conducted by the designated law enforcement agency. 18 U.S.C. §3122(b). Upon review of such an application, a court "shall" enter an ex parte order authorizing the pen register if the court finds that the government attorney has in fact made the proper certification. 18 U.S.C. §3123(a). As the legislative history reflects, §3123(a) "does not envision an independent judicial review of whether the application meets the relevance standard, rather the Court needs only to review the completeness of the certification submitted." S. Rep. No. 541, 99th Cong., 2d Sess. 1, 47 (1986), reprinted in 1986 U. S. Code Cong. & Ad. News 3555, 3601.

On June 28, 1989, the Court was presented with an application for the

installation and use of a pen register device on cellular telephone number (404) 626-2032. Although the "applicant" was listed as AUSA Joseph D. Newman, the application was actually presented by AUSA Kathy M. Aldridge, who works in the same office as Mr. Newman. Generally, the Assistant United States Attorney seeking a pen register authorization presents the application in person; from time to time, however, the Court has permitted another Assistant to submit the application where the person named as "applicant" is unavailable. In all such cases, it is the practice of the undersigned judicial officer to inquire whether the AUSA presenting the application is familiar with the general background of the criminal investigation and can assure the Court as to the accuracy of the

certification set forth in the application. The very purpose of having the AUSA swear to the truthfulness of the application is to ensure that whoever presents the application is in fact a proper "applicant" within the meaning of the pen register statute. In any case, the Court would decline to enter an Order authorizing a pen register if the AUSA who presents the application is unable to certify personally that the pen register is likely to result in information relevant to an ongoing criminal investigation. Although I have no specific recollection of the presentation of this particular application for a pen register, I find that the Court's standard procedure was employed in this case.

In this case, AUSA Kathy M. Aldridge signed the application "for

Joseph D. Newman." The defendant is entirely correct that it cannot be said from the face of the application that Ms. Aldridge is in fact an "applicant" who is signing the form "under penalty of perjury" (as stated in the final paragraph of the application).[2] I find, however, that despite the manner in which Ms. Aldridge signed the application, she was in fact an "applicant" within the meaning of 18 U.S.C. §3122. Before issuing the pen register Order, the Court required Ms. Aldridge to attest to the truthfulness of the certification set forth in the application that she was presenting. I find that this procedure satisfies the "oath or equivalent affirmation"

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[2] Obviously, Ms. Aldridge could not expose Mr. Newman to the penalty of perjury by signing an application on his behalf.

requirement of §3122(a). See United States v. Florea, 541 F.2d 568 (6th Cir. 1976), cert. denied, 430 U.S. 945 (1977) (FBI agent's failure to sign affidavit in support of wiretap application did not require suppression where judge based order on agent's sworn statements made in his presence).

Even assuming the Court were to conclude that Ms. Aldridge never became a proper applicant for an Order authorizing the use and installation of a pen register, the defendant is not entitled to the suppression of the information which the government obtained through the use of the pen register. As noted earlier, the use of a pen register device does not result in a "search" for purposes of the Fourth Amendment, and therefore there is no constitutional requirement that a

warrant be obtained prior to the installation of such a device. Accordingly, the government's noncompliance with the provisions of §3122 in obtaining an order authorizing the installation of a pen register would not require or justify the invocation of the judicially created "exclusionary rule" for remedying Fourth Amendment violations. See Stone v. Powell, 428 U.S. 465, 482, 486 (1976); United States v. Comstock, 805 F.2d 1194, 1207-08 (5th Cir. 1986) (judicially created exclusionary rule is applicable only to constitutional violations). Application of such an exclusionary rule in this case would be inappropriate since no constitutional violation occurred.[3]

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[3] Even if the Fourth Amendment applied, it is questionable whether suppression would be warranted in view of

Perhaps anticipating this point, the defendant suggest that the statutory exclusionary rule set forth in Title III of the Omnibus Crime Control and Safe Streets Act of 1968 -- the federal wiretap law -- requires the suppression of evidence obtained pursuant to a pen register order which was based on a defective application. The Supreme Court has held that "[b]oth the language of the

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the Supreme Court's decision in United States v. Leon, 468 U.S. 897 (1984). Leon recognized a good faith exception to the exclusionary rule where government agents obtained evidence in objectively reasonable reliance on a properly issued search warrant which was later found to be invalid for lack of probable cause. See Massachusetts v. Sheppard, 468 U.S. 981 (1984); United States v. Malekzadeh, 855 F.2d 1492, 1497 (11th Cir. 1988) (applying Leon's good faith exception to the exclusionary rule to uphold a Title III wiretap). Leon would apply with compelling force in this case since the agents reasonably relied on a pen register order which was arguably invalid only because the application was not properly signed.

[wiretap] statute and its legislative history establish beyond any doubt that pen registers are not governed by Title III." United States v. New York Telephone Co., 434 U.S. 159, 166 (1977). "It is clear that Congress did not view pen registers as posing a threat to privacy of the same dimension as the interception of oral communications and did not intend to impose Title III restrictions upon their use." Id. at 168. Undaunted by this precedent, the defendant suggests that since the definitional section of the more recently enacted pen register statute refers to the wiretap statute for the definition of certain terms, 18 U.S.C. §3127(1), it is therefore "clear" that violations of the pen register statute are subject to the Title III exclusionary rule.

It is an elemental cannon of statutory construction "'that the mention of one thing implies the exclusion of another; expressio unius est exclusio alterius.'" United States v. Castro, 837 F.2d 441, 442 (11th Cir. 1988). While Congress, in enacting the pen register statute, borrowed certain definitions set forth in §2510 of the wiretap statute, it nowhere adopted or incorporated the statutory exclusionary rule set forth in an entirely different section of Title III. 18 U.S.C. §§2515, 2518(10)(a). By clear implication, therefore, Congress never meant to apply the Title III exclusionary rule to violations of the pen register statute.[4] While the expressio

[4] Further evidence of this intent is seen in 18 U.S.C. §3121(c), which provides that the knowing use of a pen register without a court order shall result in a fine or imprisonment up to one year. Had

unius principle must yield to persuasive evidence of contrary legislative intent, Transamerica Mortgage Advisors, Inc. v. Lewis, 444 U.S. 11, 19-24 (1979); Castro, 837 F.2d at 443, there is no indication in the legislative history of the pen register statute that Congress meant to incorporate into that statute the exclusionary rule which it had fashioned for violations of Title III. It appears, therefore, that there is neither a constitutional nor a statutory basis for excluding the evidence which the government obtained pursuant to the pen register authorized by this Court's Order of June 28, 1989.

In a related area, numerous cases from this circuit and the new fifth

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Congress chosen to adopt the additional "exclusionary" penalty set forth in Title III, it could certainly have done so.

circuit have recognized that, absent a clear constitutional violation, noncompliance with the provisions of Fed. R. Crim. P. 41 in the issuance of a search warrant requires suppression of evidence only where "'(1) there was 'prejudice' in the sense that the search might not have occurred or would not have been so abrasive if the rule had been followed or (2) there is evidence of the intentional and deliberate disregard of a provision in the Rule.'" United States v. Comstock, 805 F.2d 1194 (5th Cir. 1986) (issuance of a search warrant by a state court which was not a "court of record" as required by Rule 41 did not require the suppression of evidence seized in the search); United States v. Loyd, 721 F.2d 331, 333 (11th Cir. 1983) (magistrate's failure to certify the accuracy of the transcript of

a taped oral search warrant did not require suppression), quoting United States v. Stefanson, 648 F.2d 1231 (9th Cir. 1981); United States c. Giancarli, 617 F.Supp. 551, 553-54 (S.D. Fla. 1985) (magistrate's failure to place affiant under oath before issuing telephone search warrant did not require suppression of the evidence seized pursuant to the warrant). See also United States v. Mendoza, 491 F.2d 534, 538-39 (5th Cir. 1974) (upholding the validity of a search warrant even though the affidavit had not been signed by the proper affiant). These cases, particularly the decisions in Giancarli and Mendoza, involve defects at least at [sic] serious as the alleged deficiency in this case. Moreover, since each of the cited cases involves the issuance of a search warrant, thereby

implicating privacy concerns of greater importance than those posed by the issuance of a pen register, it would appear that the holdings apply with more compelling force to the present case.

In this case, the defendant has made no allegations of prejudice, and there is no evidence of an intentional disregard of the statutory oath requirement. Suppression of the evidence obtained through the pen register is therefore not required.

II. Was There Insufficient Probable Cause to Link Defendant to the Subject Cellular Phone?

Defendant next argues that the wiretap evidence should be suppressed because the affidavit of DEA Special Agent Darrell Snider failed to establish probable cause to believe that Byron

Thompson made use of cellular telephone number (404) 626-2032. Defendant's counsel alleges that his review of the taped conversations from the first wiretap have failed to establish that Byron Thompson was the caller (and failed to confirm that the intercepted conversations related to drugs or money as alleged by the government). Defendant further alleges that a subsequent tape of a consensually monitored conversation involving a government informant provides no basis for identifying the other speaker as Byron Thompson. Defendant also notes that there was nothing on this tape "directly relating" to narcotic drugs or money.

It is well settled that "[a] wiretap application need not provide probable cause of criminal activity for

each person named in an application, or even every resident of the place where the wiretap is sought." United States v. Domme, 753 F.2d 950, 954 n. 1 (11th Cir. 1985); United States v. Doolittle, 507 F.2d 1368, 1371 (5th Cir.), aff'd en banc, 518 F.2d 500 (1975), cert. dismissed, 423 U.S. 1008, cert. denied, 430 U.S. 905 (1977); United States v. Harvey, 560 F.Supp. 1040 (S.D. Fla. 1982), aff'd, 789 F.2d 1492 (11th Cir.), cert. denied, 479 U.S. 854, 855, 886 (1986). Nor is it a prerequisite to a wiretap authorization that the subscriber of the telephone service be suspected of unlawful activity. United States v. Tehfe, 722 F.2d 1114 (2d Cir. 1983), cert. denied, 466 U.S. 904 (1984). "What is required is sufficient information so that a judge could find probable cause to believe that the

telephone in question is being used in an "illegal operation." United States v. Domme, 753 F.2d at 954 n. 1 (emphasis added); United States v. Tehfe, 722 F.2d at 1118; United States v. Hyde, 574 F.2d 856, 862 (5th Cir. 1978).

At no point has the defendant alleged that the wiretap affidavit fails to set forth probable cause evidence that cellular phone number (404) 626-2032 was being used in connection with suspected violations of the federal narcotics laws. Nor could defendant make such an argument, for an examination of the affidavit reveals abundant probable cause to believe that electronic surveillance of this phone would yield incriminating evidence. Thus, even if defendant were correct in arguing that the affidavit fails to set forth probable cause evidence that "Byron

Thompson made use of this cellular telephone," the wiretap order was nevertheless appropriate since there was clear evidence that someone was using the phone for criminal purposes. See United States v. Van Horne, 789 F.2d 1492, 1499 (11th Cir. 1986) (electronic surveillance appropriate even during defendant's temporary absence where there was probable cause to believe that other possible coconspirators would be intercepted during this period). See also United States v. Donovan, 429 U.S. 413 (1977) (statutory requirement that application identify the person whose communications are to be intercepted does not play a central, or even a functional, role under Title III).

Moreover, I cannot accept the defendant's assertion that the affidavit fails to establish probable cause that he

made regular use of the cellular telephone to conduct the business of his criminal organization. When read in a commonsense [sic] and practical fashion -- rather than in the hypertechnical manner urged by the defendant -- it is clear that the affidavit presented sufficient information to believe that Byron Thompson was the head of a large-scale cocaine distribution organization, that he made frequent use of telephones to conduct his business, and that he specifically used the subject cellular phone in his ongoing criminal activity.

After a careful review of the application and affidavit for the second wiretap Title III, I find that the application and affidavit demonstrate probable cause to believe that a crime was being committed, that the criminal

activity involved the use of the subject cellular telephone, and that the government provided a sufficient justification for the use of wiretap rather than other investigative techniques. Accordingly, the defendant's second ground for the suppression of the wiretap evidence is without merit and should be DENIED.

III. Did the Agents Fail to Minimize Intercepted Conversations?

In his final argument, the defendant contends that the government agents failed to comply with the minimization requirement of 18 U.S.C. §2518(5), which provides that Title III wiretaps should "be conducted in such a way as to minimize the interception of communications not otherwise subject to interception under this chapter...."

During the pretrial motions hearing on November 9, 1989, the government presented evidence of the efforts it took to ensure compliance with the minimization requirements of the wiretap law.[5] After the wiretap orders were entered, but prior to the initiation of the wiretap, AUSA Joseph Newman and Special Agent Darrell Snider conducted a minimization meeting with the law enforcement officers who would be employed

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[5] During the hearing the government tendered a list of the various items of evidence that were relevant to the minimization issue. These evidentiary materials, which had previously been filed with the Court and placed under seal, consisted of the minimization instructions to the monitoring agents, the wiretap intercept logs, the weekly summaries to the district court, the various applications and Title III orders, and the original tapes. Rather than opening these sealed materials, the Court requested, and the government furnished, copies of the materials relevant to the Court's minimization inquiry.

as monitors during the execution of the wiretap. After the monitors were briefed as to the nature and purpose of the government's criminal investigation, they were furnished with copies of Agent Snider's affidavit in support of the wiretap and with a memorandum of "monitoring instructions" prepared by AUSA Newman. The monitors were then required to read these documents in the presence of Mr. Newman and the case agent and to acknowledged that fact on a form attached to the monitoring instructions.[6] Through this procedure, the government prosecutor sought to acquaint the monitors with the subject matter of the investigation, the purpose of the wiretap, and the nature of the conversations which could be

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[6] The authorization form reflects that Mr. Newman read the minimization letter to each of the monitors.

intercepted. The written monitoring instructions and wiretap affidavit were then placed at the listening post for the agents' reference, and the monitors were instructed to contact Mr. Newman or Agent Snider should any questions arise. The agents were further instructed that the failure to minimize conversations could result in the suppression of the fruits of the wiretap.

During the minimization briefing, the prosecutor advised the agents that they were prohibited from listening to any conversations which fell within a legal privilege. The agents were further specifically instructed that they must minimize the interception of conversations that did not relate to the conspiracy under investigation. In this regard, the agents were instructed to

intercept all "pertinent conversations while minimizing the interception of innocent (non-criminal) conversations." To emphasize the importance of the minimization requirement, the agents were cautioned that they could be called upon to testify in court as to why a particular conversation was intercepted.

The government noted during the minimization hearing that, as to the second wiretap of (404) 626-2032, only outgoing calls could be monitored since the cellular phone company had disabled the phone due to nonpayment of the bill. The case agent also noted that coded language was employed by the suspected conspirators during the course of the wiretap and that in several intercepted conversations a caller stated that the phone was "not cool" or otherwise

indicated that the phone was possibly tapped.[7]

The government and defendant agree that there were a total of 584 telephone intercepts during the second wire tap [sic]. Special Agent Snider testified that since an intercept occurred each time the phone receiver was picked up, included within the intercepts were many busy signals, unanswered calls, wrong-number calls or misdialings, calls made to a pager, and other instances where the receiver was lifted momentarily but was not dialed. According to the government, of the intercepts during the

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[7] The government agents also received evidence that the conspirators suspected that a surveillance camera had been placed on a telephone pole near one of the residences utilized in the criminal enterprise. In fact, the government did obtain authorization from this Court to install a video surveillance camera.

second wiretap which involved actual conversations, 51 of the calls were minimized. The government's case agent conceded on cross-examination that there were a large number of nonpertinent calls which were not minimized.

From my review of the intercept logs for cellular phone (404) 626-2032, I find that the 584 intercepts during the second wiretap, there were 176 instances where no conversation occurred due to either a busy signal, an unanswered call, a wrong-number call, a call to a pager, or a call received by a telephone answering machine. Of the 408 remaining intercepts involving actual conversation, I find that some form of minimization occurred with respect to 58 of these calls.[8] I further

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[8] The log sheets reflect that the following calls were minimized: call nos. 7, 18, 26, 50, 58, 62, 67, 80, 82, 84, 85,

find that 77 of the 408 successfully completed calls involved telephone conversations lasting longer than two minutes. Minimization occurred with respect to 35 of the 77 calls in excess of two minutes. Of the 42 nonminimized calls lasting longer than two minutes, at least 15, and possibly 25, of the calls were nonpertinent.[9]

91, 98, 107, 136, 144, 163, 171, 249, 278, 325, 345, 347, 351, 360, 367, 368, 384, 392, 396, 397, 404, 405, 406, 415, 416, 426, 451, 455, 456, 457, 463, 466, 470, 475, 484, 485, 508, 518, 535, 543, 545, 546, 547, 548, 549, 551, 553, 554, 556, and 567. Although the "minimization" block on several of the log sheets was not checked (call nos. 7, 351, 384, and 345), the synopsis reflects that minimization did in fact occur during these calls.

[9] Of the nonminimized calls over two minutes the following 15 calls were clearly not pertinent: call nos. 29, 34, 42, 94, 124, 131, 166, 208, 231, 273, 319, 426, 428, 507, and 509. The record is somewhat ambiguous as to the pertinence of the following calls: 22, 110, 181, 194, 261, 280, 290, 292, 296, and 425.